Supreme Court, U.S.
FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN GREY,

Petitioner,

v.

THE FIRST NATIONAL BANK OF CHICAGO and DANIEL J. WROBLEWSKI,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENTS' BRIEF IN OPPOSITION

MITCHELL WARE *
MARTIN P. GREENE
JONES, WARE & GRENARD
180 North LaSalle Street
Suite 800
Chicago, Illinois 60601
(312) 263-4882

LYNN GOLDSTEIN
One First National Plaza
Chicago, Illinois 60670
(312) 732-3618

Attorneys for Respondents The First National Bank of Chicago and Daniel J. Wroblewski

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

Whether this Court has jurisdiction to review a state appellate court decision on the existence of a tort remedy under state common law, where the state supreme court has declined such review, and where petitioner made no argument in any state court that his claim raised a federal question under the Constitution, statutes, or treaties of the United States.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Appellate Court (Pet.App. 3-12) is reported at 169 Ill.App.3d 936, 532 N.E.2d 1138. The order of the Illinois Supreme Court denying a petition for leave to appeal (Pet.App. 2) is reported at 122 Ill.2d 574, 530 N.E.2d 245.

JURISDICTION

The judgment of the appellate court was entered on May 5, 1988. No petition for rehearing was filed. On June 6, 1988, petitioner filed a motion with the Illinois Supreme Court seeking leave of court to file a petition for leave to appeal *instanter* which was allowed by an order entered on June 14, 1988. The Illinois Supreme Court denied the petition on October 6, 1988. On January 3, 1989, petitioner filed an application for an extension of time to file a petition for writ of certiorari. This application was allowed by an order entered by JUSTICE JOHN PAUL STEVENS on January 6, 1989 which extended the time for filing the petition to February 6, 1989. Although petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1651(a) (Pet. 2), the proper jurisdictional basis for reviewing "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had . . ." is 28 U.S.C. sec. 1257. This Court's jurisdiction to review the judgment of the Illinois Appellate Court is disputed.

STATUTES INVOLVED

Title 28 U.S.C.

Sec. 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(a) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in ques-

tion on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals. 28 U.S.C. sec. 1257, as amended, Public Law 100-352, 102 Stat. 662.

Sec. 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. 28 U.S.C. sec. 1651.

STATEMENT OF THE CASE

Petitioner John Grey seeks review of a judgment of the Illinois Appellate Court, First District which affirmed an order of the Circuit Court of Cook County which had dismissed petitioner's common law retaliatory discharge claim for failure to state a cause of action and granted summary judgment to respondents, The First National Bank of Chicago ("First National Bank" or "Bank") and Daniel J. Wroblewski ("Wroblewski"), on petitioner's claim that respondents were guilty of the common law tort of intentional infliction of emotional distress. (R. 1995, 2063).

Petitioner was employed in the First National Bank's Trust Department as an assistant legal analyst from 1972 until he voluntarily resigned on September 14, 1979. (R. 432-434, 932, 1421 pars. 3-4). Petitioner's duties included preparing work for attorneys in the Bank's Trust Department which was reviewed by a legal reviewer. (R. 434-438). Wroblewski was petitioner's immediate supervisor from December, 1976 through September, 1979. (R. 440, 471, 866, 1422 par. 5). It is petitioner's position that the impetus for his voluntary resignation was Wroblewski's harassment in retaliation for his internal opposition to the Bank's filing an allegedly perjured affidavit in civil litigation pending in the United States District Court for the Central District of California. (Pet. for Cert. 18, 21-22, 24). Throughout this litigation, however, petitioner has never asserted that the Bank's conduct which preceded his voluntary resignation deprived him of "any title, right, privilege or immunity . . . under the Constitution, treaties or statutes of . . . the United States." 28 U.S.C. sec. 1257(a).

I. The "Perjured" Affidavit.

Petitioner claims that in March, 1978, Linda Matsler ("Matsler"), a legal reviewer assigned the responsibility of making proofs of claim in class action litigation (R. 1548, 1550), approached him about her need to mail some litigation matters. Matsler expressed concern as to whether or not a deadline had expired. (R. 540, 1422 par. 7). In April 1978, petitioner observed Helen Hahne ("Hahne"), an attorney in the Trust Department Legal Division (R. 1882), repeatedly place an unidentified document upon Matsler's desk and Matsler repeatedly hand the document back to Hahne. Matsler did not sign the document while petitioner was watching. (R. 505-507, 540, 552). In May

or June, 1978, Matsler was relieved of the responsibility for class action assignments. (R. 562, 1423 par. 9).

According to petitioner, on August 4, 1978, following a meeting, Annie Amos ("Amos"), another legal analyst (R. 1835), told him that Hahne had requested Matsler to sign an affidavit in April, 1978. Amos then expressed her view that the affidavit was false. (R. 553, 575, 1568, 1576).

In November, 1978, while working on some trust accounts, petitioner happened upon a notice from the Mattel Claims Processing Center rejecting the Bank's claim for failure to submit proof of authority in the case of *Greenfield v. Mattell, Inc.* in the United States District Court for the Central District of California. (R. 524, 527, 586, 596). Petitioner also found an unexecuted affidavit prepared for Hahne's signature in connection with a motion to reconsider a court order in that case. (R. 529, 576, 597-604).

Petitioner thought that paragraphs 16 and 17 of the affidavit were not true. These paragraphs recited a belief that proof of authority was mailed to California in the first week of March, 1978. (R. 541-545). Specifically, petitioner thought that the statement as to Hahne's "belief" was not true. Petitioner's conjecture was based upon Matsler's approaching him in March, 1978 and his observation of the encounter between Hahne and Matsler in April, 1978. (R. 540, 545). In November, 1978, petitioner had no first hand knowledge of whether Hahne's affidavit inaccurately stated her belief. (R. 539). According to petitioner, he did not talk to Matsler concerning whether Hahne's affidavit was untrue until mid-December, 1978. (R. 547, 553, 1432 par. 36, 1574-1575).

II. Petitioner's Confrontation With Wroblewski.

In November, 1978, Wroblewski asked petitioner to take responsibility for the class action assignments previously handled by Matsler. Petitioner refused stating that he did not want to do so until the Hahne affidavit matter was "cleared up." Petitioner stated his intention to bring these matters to the attention of the Bank's Personnel Department. Petitioner claims that Wroblewski responded that petitioner was not going to "taint" his department. (R. 487-488, 513, 528, 554-555, 557, 640, 656, 884-884A, 911, 935, 937, 988, 1425 par. 16).

III. Wroblewski's Disciplinary Actions Against Petitioner.

First National Bank Personnel Policy Number 807 provided for four phases of disciplinary proceeding before an employee could be discharged. The four steps in this process were: (1) an informal discussion between the employee's supervisor and the employee; (2) a verbal warning regarding the employee's performance with a written record maintained of the warning; (3) a final written warning; and (4) the supervisor's recommendation of termination. (R. 658, 835-841, 1658, 1701). Between December, 1978 and September, 1979, Wroblewski initiated four disciplinary actions against petitioner concerning his noncompliance with the Bank's dress guidelines, petitioner's misrepresentation of facts, petitioner's excessive absenteeism and petitioner's quantity of work. (R. 1265).

A. The Dress Guidelines Disciplinary Action.

On December 4, 1978, Wroblewski advised petitioner that he was not in compliance with the Bank's dress guidelines (R. 820-821, 1076-1078) because he was not wearing a belt with slacks which required a belt, was not

wearing a suit or sports coat in customer contact areas and his shoes were damaged and in need of repair. (R. 451, 564, 647-653, 659-660, 943-945, 970). On December 5, 1978, Wroblewski read a memorandum to petitioner advising him of the need to purchase suitable attire. (R. 779-780, 955, 957, 1074-1075). Petitioner's response was that he had another pair of shoes which were being repaired and that a belt irritated an infected mole. (R. 1426 par. 17). The belt and coat issues were resolved by petitioner cutting the belt loops off his pants and wearing a sports coat. (R. 951, 954, 970).

Wroblewski directed petitioner to purchase new shoes by December 11, 1978. (R. 971, 1080-1082). Because petitioner claimed that he had to special order his shoes, which would take one or two months to obtain, Wroblewski demanded proof of purchase for the order by December 18, 1978. (R. 565, 660-661, 1428 par. 21, 1632-1633).

On December 20, 1978, petitioner presented to Wroblewski a $5.00 cash register receipt; he claimed that the receipt was for a deposit on his order of new shoes. (R. 786, 998, 999-1001, 1013, 1079, 1451). Wroblewski told petitioner that the receipt was not adequate proof that he had either purchased or ordered a new pair of shoes. (R. 565-566, 663-667, 781, 1001).

When petitioner still had not obtained adequate proof of purchase, on December 26, 1978, Wroblewski wrote him a memorandum dated December 27, 1978 offering him the final deadline of December 29, 1978 at 9:00 a.m. to furnish proof that he had purchased the shoes. (R. 567, 667-668, 783-786, 1004-1005, 1080-1092). Petitioner gave the excuse that his difficulty in obtaining the proof was caused by the weather and traffic. He promised that he would obtain the receipt as soon as possible. Wroblewski insisted

on compliance. (R. 782, 1003, 1016). Petitioner's mother then offered to pick up the proof of purchase but was unable to do so because she fell down on her way and knocked out some of her teeth. (R. 567, 1020, 1635-1636). Petitioner asked for an extension of time to obtain the proof of purchase but Wroblewski told him to comply with the December 27, 1978 memorandum. (R. 1023). On December 29, 1978, petitioner provided Wroblewski with a receipt dated December 18, 1978 which indicated that a deposit had been received for a pair of shoes but did not indicate when the shoes would be delivered. (R. 672, 789, 1024, 1456, 1636-1638).

On January 3, 1979, Wroblewski informed petitioner that he had not met the standards regarding the proof of purchase of the shoes and obtained petitioner's permission to telephone the shoe store to ascertain whether his representations were correct. (R. 1040, 1047, 1644-1645A). That same day Wroblewski and Michael Taylor, Trust Personnel Assistant, telephoned the manager of the shoe store. (R. 1652-1656). They were told by the manager that a pair of shoes had been offered to petitioner and that he had declined to take them. (R. 1660). Wroblewski and Taylor concluded that petitioner's account of his purchase of shoes had been untruthful.

On January 16, 1979, Wroblewski read petitioner a memorandum which stated, based upon Wroblewski's conversation with the manager of the shoe store, that Wroblewski had concluded that petitioner had failed to meet the standards outlined regarding the proof of purchase for the shoes. Wroblewski gave petitioner 30 days to secure proof that the shoes ordered would be delivered before the 30 day period expired or to secure a different pair of shoes than the ones ordered if the ordered pair could not be delivered in time. (R. 685-688, 795-800, 1140-1153, 1156-

1157, 1204-1209, 1658B-1671, 1755-1760). When petitioner finally complied with his supervisor's requests by obtaining the new pair of shoes within the 30 day period, the disciplinary action with respect to compliance with the dress guidelines was concluded. (R. 1154, 1255, 1269, 1719, 1783-1784).

B. The Misrepresentation Of Facts Disciplinary Action.

On January 16, 1979, Wroblewski read to petitioner a memorandum which stated that petitioner had deliberately misrepresented the facts regarding the ordering and purchasing of the new pair of shoes. (R. 680-685, 790-794, 1121-1127, 1196-1200, 1664-1665, 1699-1700, 1761-1765). Because of these misrepresentations, Wroblewski informed petitioner that he expected petitioner to be more precise and open with regard to the facts relating to the purchase of the shoes and not to furnish him with false or misleading facts or information or imply facts that would lead him to infer facts which were not entirely correct or to give him false impressions regarding petitioner's ability to comply with the disciplinary procedure regarding the shoes. (R. 1561-1565). In February, 1979, petitioner was conditionally discharged from this disciplinary action. (R. 1155, 1266, 1720).

C. The Excessive Absenteeism Disciplinary Action.

In February of 1979, Wroblewski had a meeting with petitioner in which the latter was informed that as of February 12, 1979 he had been absent 16 full days and 4 partial days. This was a total of 18 working days out of an available 34 working days since January 1, 1979. (R. 1262, 1348-1350). At the same time Wroblewski told petitioner that he had 30 days to substantially improve his attendance record. Thereafter, petitioner's attendance improved

and this disciplinary action never progressed any further. (R. 1264).

D. The Quantity Of Work Disciplinary Action.

Wroblewski required each legal analyst to produce 80 items of work per month. (R. 443, 642, 654, 904). Another disciplinary action arose primarily out of petitioner's failure to produce 80 items of work each month.

On December 5, 1978, the matter of the quantity of petitioner's work arose. (R. 1426-1427 par. 18). For the month of November, 1978, petitioner had not met Wroblewski's production standard because he had produced only 59 items. (R. 1201-1203).

For the month of December, 1978, petitioner's work improved but only to the total of 78 items. On January 16, 1979, Wroblewski read to petitioner a memorandum regarding the quantity of work produced by him for the month of December. (R. 711-712, 1132-1139). Even though petitioner's output was still below the required amount, because he had shown some slight improvement, Wroblewski told petitioner that he was only going to monitor his work for the next quarter (*i.e.*, January, February and March of 1979). (R. 812-814, 1201-1203).

In April, 1979, Wroblewski had another meeting with petitioner about the quantity of work produced by him. (R. 1272-1280). In that meeting Wroblewski told petitioner that the amount of work he had produced for the months of January, February and March of 1979, 65, 60 and 65 items respectively, was again below the required amount, 80 items. Wroblewski intended to continue to monitor petitioner's work for the next quarter (*i.e.*, April, May and June of 1979). (R. 747, 829-832, 1351-1353). Petitioner acknowledged that during this period he was averaging be-

tween 40 and 45 items per month. (R. 453). Petitioner's excuse for not meeting the production standard was that in either February or March of 1979 all of his work, except for a few items, had been taken from him, that no new work was assigned to him and that he was not getting credit for a number of assignments which he had done. (R. 451, 748, 750, 752).

After the conclusion of the quarter ending in June 1979, petitioner had another meeting with Wroblewski about his work. (R. 1290-1291). In that meeting Wroblewski gave petitioner a memorandum in which he was informed that the quantity of work produced by him for the months of April, May and June of 1979 was 49, 28 and 72 items respectively. These amounts were not adequate to release petitioner from the disciplinary action. Therefore Wroblewski told petitioner that his output would again be monitored for the next quarter (*i.e.*, July, August and September). (R. 842-845, 1491-1494, 1730-1731). In that memorandum, Wroblewski also informed petitioner that if during those three months his average output did not meet the production standard, Wroblewski would recommend that petitioner be dismissed.

Petitioner had two excuses for not meeting the production standard for this quarter. The first was that because a new person had begun reviewing his work, a backlog of work had built up which resulted in petitioner not getting credit for work that he had completed. The second was that Wroblewski had just started assigning to petitioner the usual amount of work to do and that it would take awhile for this to be reflected in the amount of work he produced. (R. 1290-1294).

In July, 1979, petitioner produced over 100 items. (R. 1296). However, in August, 1979, his productivity was again below the required amount. (R. 1298). According to

petitioner, the reason for the high amount in July was that some of the work which had been backed up on the reviewer's desk had been processed and the reason for the low amount in August was that a back-up on the reviewer's desk had again accumulated. (R. 1297-1298). In September, 1979, Wroblewski advised petitioner that he had under-produced for August, 1978. Wroblewski did not advise him that he was going to be fired. (R. 1303-1305). Petitioner claimed to believe that Wroblewski was "going to apparently terminate [petitioner]" (R. 1303) and voluntarily submitted his resignation on September 14, 1979. (R. 1322-1323).

IV. Procedural History.

On May 22, 1981, petitioner filed a complaint against the Bank and Wroblewski (R. 2-7) which, as eventually amended, sought recovery for the common law torts of constructive retaliatory discharge and intentional infliction of emotional distress. (R. 113-112). On April 1, 1986, respondents moved for summary judgment on both of petitioner's substantive claims. (R. 198-206). On July 9, 1986, the trial court *sua sponte* dismissed petitioner's retaliatory discharge claim for failure to state a cause of action and granted summary judgment on the intentional infliction of emotional distress claim. (R. 1995). Petitioner's motion for reconsideration was denied on January 9, 1987 (R. 2063) and he filed his notice of appeal on February 9, 1987. (R. 2064-2065).

On May 5, 1988, the Illinois Appellate Court affirmed the judgment of the trial court. (169 Ill.App.3d 936, 523 N.E.2d 1138). Before the appellate court, petitioner restricted his argument to the contentions that the court should recognize a new tort cause of action for "constructive" retaliatory discharge and that respondents' discipline

constituted the intentional infliction of severe emotional distress. The appellate court found that petitioner had not been discharged in that his resignation was voluntary and not coerced. The appellate court went on to follow the Illinois Supreme Court decision in *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill.2d 526, 519 N.E.2d 909 (1988) and refused to recognize constructive discharge in a cause of action in regard to retaliatory discharge. (169 Ill.App.3d 936, 940-943, 523 N.E.2d 1138, 1141-1143). The appellate court further held that respondents' conduct as a matter of law did not amount to the intentional infliction of severe emotional distress. 169 Ill.App.3d 936, 943-945, 523 N.E.2d 1138, 1143-1144.

In seeking discretionary review of the appellate court's judgment by the Illinois Supreme Court, petitioner advanced internally inconsistent positions regarding his retaliatory discharge claim. Petitioner initially contended that he had been "actually" discharged in retaliation for his "citizen crime fighter" activities (Petition for Leave to Appeal in No. 67126 (Illinois Supreme Court), pp. 29-31), an argument which had not been raised in either the appellate court or the trial court. Petitioner then asserted that he was the victim of a "constructive" discharge and argued that the concept of "constructive" retaliatory discharge should be recognized as a viable tort in Illinois. Petition for Leave to Appeal in No. 67126 (Illinois Supreme Court), pp. 32-35.

With respect to his intentional infliction of severe emotional distress claim, petitioner argued that the appellate court's ruling departed from settled principles governing a motion for summary judgment. He further asserted that the appellate court's failure to apply the standards governing this tort, granted deference to the Bank's "criminal activities" of submitting an allegedly perjured affi-

davit to the federal district court. (Petition for Leave to Appeal in No. 67126 (Illinois Supreme Court), pp. 36-40).

On October 6, 1988, the Illinois Supreme Court rejected all of plaintiff's theories by denying, without comment, petitioner's petition for leave to appeal. 122 Ill.2d 574, 530 N.E.2d 245.

SUMMARY OF ARGUMENT

Petitioner has advanced no reason why this Court has jurisdiction to review the judgments of the Illinois Supreme Court and the lower courts in this case. At issue is the power of the judiciary of the State of Illinois to create and define the contours of its common law tort remedies. In the absence of any claim that the decisions of its courts are repugnant to the United States Constitution or the laws of the United States, the Illinois courts have absolute autonomy to create and define the elements of their tort remedies. Petitioner has advanced no federal claim impugning the validity of the Illinois Supreme Court's decision in this case and thus this Court lacks the power to accept review of the state court's judgment.

To the extent that petitioner's *pro se* petition for a writ of certiorari may reasonably be construed as attempting to assert the existence of a federal question, two independent reasons mandate that this case not be accepted for further appellate review. At no time during the proceedings before the Illinois courts did petitioner advance any argument that his rights, as guaranteed by the Constitution or federal law, had been violated by respondents' actions. This Court has consistently refused to accept review

of state court judgments where the federal question presented to this Court has not been advanced by petitioner in the state tribunal. Moreover, even if a federal question could be gleaned through some strained construction of petitioner's state court pleadings, the Illinois Appellate Court based its decision exclusively upon principles of state tort law, and the Illinois Supreme Court, when asked to review this decision, found petitioner's claims to be unworthy of further adjudication. Since the decisions of the Illinois courts are grounded solely in state law, this Court is precluded from accepting review of the petition for writ of certiorari in this case.

ARGUMENT

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE ILLINOIS COURTS BY MEANS OF A WRIT OF CERTIORARI.

A. The All Writs Act Does Not Confer Jurisdiction Over The Instant Matter.

Petitioner asserts that there is a "growing trend" of Illinois state court decisions which fosters employer harassment of employees in retaliation for the employees' complaints regarding criminal activity and argues that this Court should exercise its discretionary authority to review this case because of the "special and unusual circumstances . . ." which exist. (Pet. 2, 16). According to petitioner, such circumstances are the fact that the Bank has implemented "unfounded disciplinary actions" against an employee which "prevented" him from reporting the Bank's "crimes" to law enforcement authorities. (Pet. for Cert. 21-22). This Court's jurisdiction is invoked solely

pursuant to the All Writs Act, 28 U.S.C. sec. 1651(a). (Pet. for Cert. 2).

The All Writs Act does not, however, constitute a proper basis of appellate jurisdiction over the judgment of the Illinois courts. Section 1651(a) authorizes this Court and lower federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. sec. 1651(a). This section is not an independent basis for this Court to review the decisions of the state judiciary but instead vests this Court with the "power, in aid of its appellate jurisdiction . . . to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so." *United States Alkali Export Association, Inc. v. United States*, 325 U.S. 196, 201-202 (1945); see *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers); *Renaissance Arcade & Bookstore v. County of Cook*, 473 U.S. 1322, 1323 (1985) (STEVENS, J., in chambers); *Northern California Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1396, 1398 (1984) (REHNQUIST, J., in chambers). Instead, this Court's appellate jurisdiction to review the final judgment in this case is contained in 28 U.S.C. sec. 1257. Since the Order of the Illinois Supreme Court which denied petitioner further discretionary appellate review was entered after September 25, 1988, there is no right of appeal to this Court but only review by writ of certiorari according to the terms of section 1257(a), 28 U.S.C. sec. 1257(a).

B. Petitioner's Claim Raised Only State Common-Law Issues.

"A civil litigant may . . . seek review in this Court of any federal claim properly asserted in and rejected by state courts." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975). In the instant case, the appellate court held that petitioner's voluntary resignation was not the legal equivalent of a "discharge" for purposes of the common law tort of retaliatory discharge (169 Ill.App.3d 936, 940-943, 523 N.E.2d 1138, 1141-1143) and that respondents' alleged harassment did not constitute the tort of intentional infliction of emotional distress. (169 Ill.App.3d 943-945, 523 N.E.2d 1138, 1143-1144). The appellate court thus addressed strictly issues of state law which this Court does not have the power to decide. *Fuller v. Oregon*, 417 U.S. 40, 48 n. 9 (1974). This Court will not pass upon the wisdom of how the Illinois courts define their common law torts or "sit as an ombudsman to direct state courts how to manage their affairs . . ." but rather will restrict its scrutiny to whether the state court's judgment satisfies Constitutional requirements. *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-226 (1977); *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972).

Petitioner's challenge to the appellate court's decision is that the court was wrong in concluding that the conflicts between petitioner and the Bank which resulted in his resignation of employment were "unavoidable aspects of employment. . . ." (Pet. for Cert. 18). But in determining whether to accept review of a state court's judgment, this Court is constrained by the fact that "[t]he power delegated to [this Court] is for the restraint of unconstitutional [actions] by the States, and not for the correction of alleged errors committed by their judiciary." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 834 (1985)

(STEVENS, J., dissenting), quoting, *Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 How. 317, 343 (1847). Since the Illinois courts have the unfettered power to define their tort remedies as well as the contours of such common law actions, and since that is all that occurred here, this Court lacks jurisdiction to accept review of the petition for writ of certiorari.

C. Petitioner Failed To Raise Any Federal Question In The State Courts.

To the extent that the petition may be construed as presenting a federal question, this Court should decline to accept review of this case because no federal question was presented to or decided by the Illinois courts and the judgment of the Illinois Appellate Court rests upon an independent and adequate state ground. Petitioner appears to claim that the Bank's disciplinary actions which preceded his voluntary resignation were in retaliation for his threat to inform bank personnel officials of his belief that Hahne had submitted a false affidavit in the *Greenfield v. Mattell, Inc.* litigation and that the Bank's "retaliation" undermined the "public policy" embodied in certain federal criminal statutes. (Pet. for Cert. 17-18, 21, 24, Pet. App. 13-17). However, the questions of whether the federal statutes enumerated by petitioner give rise to a private cause of action in favor of the beneficiaries of the legislation (*Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639, 640 (1981)) and, if such a cause of action exists, whether petitioner or his conduct were encompassed within its scope were neither raised by petitioner nor decided by the Illinois courts. To the contrary, petitioner's arguments in the lower courts were restricted to the contentions that his freely-given resignation was, in fact, a "discharge" for purposes of the retaliatory discharge tort and that respondents' discipline constituted

the intentional infliction of emotional distress. Only respondents, in urging an alternative basis for the appellate court to affirm the trial court's judgment (see *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 481 (1976) (*per curiam*)) argued that petitioner's failure to report the Hahne affidavit to law enforcement officials was fatal to his retaliatory discharge claim because his activity was not protected by the "public policy" of the State of Illinois as that policy had been defined by the Illinois Supreme Court's decision in *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (1981). Because it concluded that petitioner had not been discharged by respondents, the appellate court declined to address whether petitioner's activities were protected by any "public policy". 169 Ill.App.3d 936, 943, 523 N.E.2d 1138, 1143.

As a condition precedent to this Court's exercise of jurisdiction over a judgment of a state court, subsection 1257(a) requires that in the Illinois courts the petitioner have "specially set up or claimed under the Constitution, . . . or statutes of . . . the United States" the claim of entitlement which he now seeks to have enforced by this Court. 28 U.S.C. sec. 1257(a). Similarly, United States Supreme Court Rule 21.1(h) requires the petitioner to "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court . . ." and to further provide "specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." Petitioner failed to raise any federal question in the Illinois courts and his petition conspicuously does not comply with

this Court's Rule 21.1(h) by identifying how the federal question was preserved in the lower courts. This Court has repeatedly refused to resolve questions of federal law which are raised for the first time in this Court. *Webb v. Webb*, 451 U.S. 493, 498-499 (1981). Since any federal questions now advanced by petitioner were never raised, preserved nor passed upon by the Illinois courts, this Court lacks jurisdiction to accept the petition for writ of certiorari.

Moreover, even if petitioner's pleadings in the Illinois courts could be construed as somehow raising a federal question, this Court would still lack jurisdiction in this case. Both the Illinois Appellate Court and the Circuit Court of Cook County based their rulings in favor of respondents upon the ground that petitioner's resignation was not the equivalent of a retaliatory "discharge" and that respondents' disciplinary measures did not amount to the tort of intentional infliction of emotional distress. (169 Ill.App.3d 936, 940-945, 523 N.E.2d 1138, 1141-1144, R. 2046-2060). The Illinois Supreme Court declined to accept further review of petitioner's case without opinion. (122 Ill.2d 574, 530 N.E.2d 245). Since the judgment of the Illinois courts is based upon principles of Illinois tort law, an independent and adequate state law ground exists and this Court is without power to address petitioner's federal claims. *Orr v. Orr*, 440 U.S. 268, 275-276 (1979). Thus, even if petitioner had raised a federal question before the lower courts, there is no grounds upon which this Court can grant the petition for writ of certiorari.

CONCLUSION

Since there is no jurisdiction which authorizes this Court to exercise plenary review over the decision of the Illinois Appellate Court, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MITCHELL WARE *
MARTIN P. GREENE
JONES, WARE & GRENARD
180 North LaSalle Street
Suite 800
Chicago, Illinois 60601
(312) 263-4882

LYNN GOLDSTEIN
One First National Plaza
Chicago, Illinois 60670
(312) 732-3618

Attorneys for Respondents
The First National Bank of Chicago
and Daniel J. Wroblewski

* Counsel of Record